

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Andrew Elliott v. Jean Louis Beaudry,
from the Court of Queen's Bench for the
Province of Quebec in the Dominion of
Canada (Appeal Side); delivered Tuesday,
10th March 1874.*

Present:

SIR JAMES W. COLVILE.

SIR MONTAGU E. SMITH.

SIR ROBERT P. COLLIER.

THE substantial questions in the present Appeal were decided by their Lordships in a former Appeal which came before them from the Court of Queen's Bench for Lower Canada, in a case in which Charles Leclère was the Appellant, and Beaudry, the present Respondent, was Respondent there. The present suit was brought by Beaudry, claiming to be entitled to a small share of two lots in an orchard, which he had purchased from the children of Benjamin Castonguay. He brought this suit to set aside a sale which had been made of the orchard by François Xavier Castonguay under a power of sale derived from Madame Castonguay under a deed of gift. It is not necessary to go into the title. It is enough to state the questions which were involved in the suit, because the only question which has been debated at their Lordships' bar is one of form, namely, the shape their Lordships' judgment should take in reversing, what it is admitted must be reversed, the judgment of the Court of Queen's Bench.

Two questions arose in the case : first, whether Beaudry had any title to impeach the sale, inasmuch as it was contested that the children of Benjamin, from whom he claimed, took any benefit under the deed of gift and the limitation made by Madame Castonguay. It was necessary to his case to establish that title, but his suit was not brought for that purpose. His suit was brought to set aside the sale which had been made of the lots of the orchard to several purchasers, and, amongst others, to Elliott, the Defendant in the suit and the present Appellant. After a long inquiry in the Courts below, the Court of Queen's Bench, by a majority of Judges, held that the sale made to Elliott was invalid, upon grounds which it is not necessary to go into; and they also decided upon certain exceptions which had been raised by the Defendant to Beaudry's title under the children of Benjamin, that these children did take under the deed of gift, and therefore that he had a good title. Upon the present Appeal their Lordships, adhering to the judgment they gave in the former case of *Leclère v. Beaudry*, must hold that the Court of Queen's Bench were wrong in deciding that the sale to Elliott was invalid, and they must affirm the validity of the sale, and therefore reverse the judgment of the Court of Queen's Bench upon that point.

The decision upon this, the main question in the cause, leads to the conclusion that Beaudry, the Plaintiff, had no right to sue the Defendant. His action is in the form of what would be called in this country an action of ejectment; a suit brought to turn Elliott out of possession on the ground of his holding possession under an invalid sale. He has failed in the substance of the suit, and Elliott is entitled to retain possession. His suit therefore ought to be dismissed. But, as has been already stated, the Defendant having

put Beaudry's title in issue, it was necessary for the Court below, who decided that the sale was invalid, to decide that question also; and they held that Beaudry had established the right of the children to sell to him. Their Lordships, when the same question was before them in the former Appeal, were of opinion that the Court of Queen's Bench were right in so deciding, and that the children of Beaudry did take under the gift from Madame Castonguay, and that Beaudry had a good title under them. But the proof of his title was only a step in the necessary proof to entitle him to set aside the sale. The suit could not be sustained upon that title alone, if the sale was valid, because Elliott, assuming Beaudry to have that title, had still the right to hold possession as against him, paying the rent which he had agreed to pay upon the sale. Their Lordships have no difficulty under these circumstances in coming to the conclusion that the suit ought to be dismissed; but it has been suggested on the part of the Respondent that if the suit were simply dismissed, the decision of the Court below in favour of Beaudry's title to the shares he bought might be considered to be shaken. Their Lordships do not intend to throw any doubt upon that decision, and they are desirous as far as they can, consistently with the ordinary forms, to prevent any prejudice arising to the Respondent from the reversal of the judgment of the Court of Queen's Bench. They therefore have come to the conclusion to declare, as far as they can do in the present reasons of their advice, although it may not appear in their report to Her Majesty, that the Defendant, the Appellant, has failed to establish his first and third exceptions, setting up the case that the rights were litigious, and the power to purchase them; and the fourth exception denying the title of Beaudry to the shares he had purchased; but

that having established his fifth and sixth exceptions, which averred the validity of the sale made to himself, the suit of the Respondent ought to be dismissed.

Their Lordships think that the right course will be to reverse both the judgments below ; and acting upon that opinion, they will humbly advise Her Majesty to reverse the judgments of the Superior Court and of the Court of Queen's Bench of Lower Canada, and to order that the suit be dismissed, with costs. The Appellant must also have the costs of this Appeal.